No. 21-50792

In the United States Court of Appeals for the Fifth Circuit

WHOLE WOMAN'S HEALTH, on behalf of itself, its staff, physicians, nurses, and patients; ALAMO CITY SURGERY CENTER, P.L.L.C., on behalf of itself, its staff, physicians, nurses, and patients, doing business as Alamo Women's Reproductive Services; BROOKSIDE WOMEN'S MEDICAL CENTER, P.A., on behalf of itself, its staff, physicians, nurses, and patients, doing business as Brookside Women's Health Center and Austin Women's Health Center; HOUSTON WOMEN'S CLINIC, on behalf of itself, its staff, physicians, nurses, and patients; HOUSTON WOMEN'S REPRODUCTIVE SERVICES, on behalf of itself, its staff, physicians, nurses, and patients; PLANNED PARENTHOOD CENTER FOR CHOICE, on behalf of itself, its staff, physicians, nurses, and patients; PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, on behalf of itself, its staff, physicians, nurses, and patients; PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER, on behalf of itself, its staff, physicians, nurses, and patients; SOUTHWESTERN WOMEN'S SURGERY CENTER, on behalf of itself, its staff, physicians, nurses, and patients; WHOLE WOMEN'S HEALTH ALLIANCE, on behalf of itself, its staff, physicians, nurses, and patients; MEDICAL DOCTOR ALLISON GILBERT, on behalf of herself and her patients; MEDICAL DOCTOR BHAVIK KUMAR, on behalf of himself and his patients; THE AFIYA CENTER, on behalf of itself and its staff; FRONTERA FUND, on behalf of itself and its staff; FUND TEXAS CHOICE, on behalf of itself and its staff; JANE'S DUE PROCESS, on behalf of itself and its staff; LILITH FUND, INCORPORATED, on behalf of itself and its staff; NORTH TEXAS EQUAL ACCESS FUND, on behalf of itself and its staff; REVEREND ERIKA FORBES; REVEREND DANIEL KANTER; MARVA SADLER,

Plaintiffs-Appellees,

v.

JUDGE AUSTIN REEVE JACKSON; PENNY CLARKSTON; MARK LEE DICKSON; STEPHEN BRINT CARLTON; KATHERINE A. THOMAS; CECILE ERWIN YOUNG; ALLISON VORDENBAUMEN BENZ; KEN PAXTON,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
Case No. 1:21-cv-00616-RP

OPENING BRIEF OF APPELLANT MARK LEE DICKSON

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs	Plaintiff's Counsel
• Whole Woman's Health • Alamo City Surgery Center, PLLC • Brookside Women's Medical Center, P.A. • Houston Women's Clinic • Houston Women's Reproductive Services • Planned Parenthood Center for Choice • Planned Parenthood of Greater Texas Surgical Health Services • Planned Parenthood South Texas Surgical Center • Southwestern Women's Surgery Center • Whole Woman's Health Alliance • Allison Gilbert • Bhavik Kumar • The Afiya Center • Frontera Fund • Fund Texas Choice • Jane's Due Process • Lilith Fund for Reproductive Equity • North Texas Equal Access Fund • Erika Forbes • Daniel Kanter • Marva Sadler	Christen Mason Hebert Marc Hearron Molly Duane Kirby Tyrrell Melanie Fontes Jamie A. Levitt J. Alexander Lawrence Stephanie Toti Rupali Sharma Julie Murray Richard Muniz Julia Kaye Brigitte Amiri Chelsea Tejada Lorie Chaiten Adriana Pinon David Donatti Andre Segura

Defendants	Defendants' Counsel
• Judge Austin Reeve Jackson • Penny Clarkston • Mark Lee Dickson • Stephen Brint Carlton • Katherine A. Thomas • Cecile Erwin Young • Allison Vordenbaumen Benz • Ken Paxton	Jonathan F. Mitchell Andrew B. Stephens Heather Gebelin Hacker Judd E. Stone II Beth Klusmann Natalie Thompson Benjamin S. Walton Christopher D. Hilton Halie Daniels

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Counsel for Defendant-Appellant
Mark Lee Dickson

STATEMENT REGARDING ORAL ARGUMENT

The Court has already ordered that oral argument be expedited, and this case has been calendared for argument during the week of December 6, 2021.

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There is no conceivable basis for subject-matter jurisdiction over any of the claims in this lawsuit. Litigants cannot challenge the constitutionality of a statute by suing the entire state judiciary and demanding an injunction that prevents every judge in the state from presiding over any case that might be filed under an allegedly unconstitutional law. *See Ex parte Young*, 209 U.S. 123, 163 (1908); *Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003). Nor can a litigant sue a defendant class of state-court clerks to prevent them from accepting documents that might be filed in lawsuits brought under a purportedly unconstitutional statute. *See Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981). The very suggestion that a litigant might challenge the constitutionality of a statute this way is preposterous, and the plaintiffs' claims are unequivocally foreclosed by Article III's case-or-controversy requirement and the Eleventh Amendment[1]—as well as the binding precedent of this Court.

1. We will use the phrase "Eleventh Amendment" as shorthand to refer to the constitutional sovereign immunity recognized in *Hans v. Louisiana*, 134 U.S. 1, 15-16 (1890), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The text of the Eleventh Amendment applies only to lawsuits "commenced or prosecuted against a [State] by Citizens of another State, or by Citizens or Subjects of any Foreign State," which is not the situation here. *See* U.S. Const. amend XI; *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) ("The text of the Eleventh Amendment . . . applies only if the plaintiff is not a citizen of the defendant State."); John F. Manning, *The Eleventh Amendment and The Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663 (2004).

The plaintiffs' constitutional grievances with Senate Bill 8 do not permit this Court (or any other court) to downplay or disregard the jurisdictional obstacles to their lawsuit. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (acknowledging that the plaintiffs "have raised serious questions" regarding Senate Bill 8's constitutionality, yet refusing to grant relief on account of the "complex and novel" jurisdictional questions); *Whole Woman's Health v. Jackson*, 13 F.4th 434, --- (5th Cir. 2021)[2] (acknowledging "serious" constitutional questions with Senate Bill 8 while reaffirming the "nonnegotiable principle" that "certainty of jurisdiction" must be established). The federal courts "are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the [political] branches, or of private entities."). The judiciary may decide constitutional challenges to statutes only when resolving an Article III case or controversy—which is transparently lacking here. *See Spokeo, Inc. v. Robins*, 578 U.S. 856, ---, 136 S. Ct. 1540, 1547 (2016) ("[N]o principle is more fundamental to the judiciary's proper role in our system of govern-

2. The Westlaw version of *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021) does not yet have page numbers that enable us to provide pincites. We have temporarily provided a "---" symbol in lieu of a pincite, and when Westlaw begins providing page numbers for this opinion we will file a corrected brief that supplies the missing pincites.

ment than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" (citation and internal quotation marks omitted)). To allow the federal courts to remedy the alleged constitutional violations in this litigation would give rise to a constitutional violation of its own.

STATEMENT OF JURISDICTION

The district court lacks subject-matter jurisdiction over this case because the plaintiffs have no Article III standing to sue any of the defendants. The plaintiffs' claims against the government defendants[3] are also barred by sovereign immunity.

This Court's appellate jurisdiction is secure because the defendants have appealed an order denying their motion to dismiss on sovereign-immunity grounds. *See Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (orders denying sovereign immunity are immediately appealable under 28 U.S.C. § 1291 and the collateral-order doctrine). The district court issued this order on August 25, 2021, and the defendants filed a joint notice of appeal later that day. ROA.1485-1535 (district-court order); ROA.1536-1539 (notice of appeal).

Mr. Dickson has standing to join the government defendants in appealing the district court's denial of sovereign immunity. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020); *Whole Woman's Health*, 13 F.4th at --- (denying the plaintiffs' motion to dis-

3. The term "government defendants" refers to each of the named defendants except Mark Lee Dickson.

miss Mr. Dickson's appeal). And Mr. Dickson's claims that the plaintiffs lack Article III standing to sue him are properly included within this appeal. *See Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir. 2002); *Whole Woman's Health*, 13 F.4th at ---.

STATEMENT OF THE ISSUES

1. Did the district court err by refusing to dismiss the claims against Mark Lee Dickson for lack of Article III standing?

2. Did the district court err by refusing to dismiss the claims brought against Judge Austin Reeve Jackson and Penny Clarkston for lack of subject-matter jurisdiction?

3. Did the district court err by allowing the plaintiffs to seek relief that protects nonparties to this litigation?

4. Did the district court err by refusing to refusing to require the plaintiffs to establish Article III standing with respect to each provision of Senate Bill 8?

STATEMENT OF THE CASE

On May 19, 2021, Governor Abbott signed the Texas Heartbeat Act, also known as Senate Bill 8, which prohibits abortion after a fetal heartbeat can be detected. ROA.89-113. The Heartbeat Act does not impose criminal sanctions or administrative penalties on those who violate the statute, and it specifically prohibits state officials from enforcing the law. *See* Tex. Health & Safety Code § 171.207(a) (ROA.93). Instead, the Heartbeat Act authorizes private civil lawsuits to be brought against those who violate the statute, and

it provides that these private citizen-enforcement suits shall be the sole means of enforcing the statutory prohibition on post-heartbeat abortions:

> Notwithstanding Section 171.005 or any other law, the requirements of this subchapter shall be enforced exclusively through the private civil actions described in Section 171.208. No enforcement of this subchapter, and no enforcement of Chapters 19 and 22, Penal Code, in response to violations of this subchapter, may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person, except as provided in Section 171.208.

Tex. Health & Safety Code § 171.207(a) (ROA.93). The Heartbeat Act took effect on September 1, 2021. ROA.112.

On July 13, 2021, the plaintiffs filed this lawsuit in an attempt to enjoin the enforcement the Heartbeat Act. ROA.39-87. The plaintiffs sued Judge Austin Reeve Jackson, a state district judge in Smith County, Texas, as a putative defendant class representative of every non-federal judge in the State of Texas. ROA.73-75. They also sued Penny Clarkston, who serves as clerk for the district court of Smith County, as a putative defendant class representative of every Texas court clerk. ROA.75-77. In addition to these judicial defendants, the plaintiffs sued Attorney General Paxton and several state agency officials, as well as Mark Lee Dickson, a pastor and anti-abortionist activist. ROA.54-58. Their complaint demands relief that would prohibit Judge Jackson—and every non-federal judge in the state of Texas—from considering or deciding any lawsuits that might be filed under the Heartbeat Act. ROA.84-85. It also demands an injunction that would prohibit Ms.

Clarkston (and every Texas court clerk) from accepting or filing any papers submitted in these lawsuits. *See id.* And it demands an injunction that would restrain Mr. Dickson from filing any private civil-enforcement lawsuits under the Heartbeat Act. ROA.84. Later that day, the plaintiffs filed a motion for summary judgment, ROA.238-299, and they moved for class certification on July 16, 2021. ROA.523-537.

On August 4–5, 2021, each of the defendants moved to dismiss for lack of subject-matter jurisdiction. ROA.599-618 (state agency defendants); ROA.623-632 (Judge Jackson); ROA.636-661 (Mr. Dickson); ROA.670-692 (Ms. Clarkston). Each of the government defendants raised sovereign-immunity defenses and argued that the plaintiffs lacked Article III standing to sue them. But Mr. Dickson asserted only Article III standing objections to the claims brought against him, as Mr. Dickson is a private citizen and cannot assert a sovereign-immunity defense. ROA.642-651.

On August 25, 2021, the district court issued an order denying each of the defendants' motions to dismiss for lack of subject-matter jurisdiction. ROA.1485-1535. Each of the defendants immediately appealed the district court's jurisdictional ruling. ROA.1536-39. The next morning, the defendants informed the district court that their notice of appeal had automatically divested it of jurisdiction, and they asked the district court to cancel the preliminary-injunction hearing that the court had scheduled for August 30, 2021, and stay all further proceedings in the case. ROA.1540-1542; *see also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The fil-

ing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the appeal."); *Williams v. Brooks*, 996 F.2d 728, 730 (5th Cir. 1993) ("[T]he filing of a non-frivolous notice of interlocutory appeal following a district court's denial of a defendant's immunity defense divests the district court of jurisdiction to proceed against that defendant."). The defendants also informed the district court that they would seek emergency relief from this Court that if it did not cancel the preliminary-injunction hearing and vacate all deadlines by close of business on August 26, 2021. ROA.1547. When the district court failed to take these steps by the end of the day on August 26, 2021, the defendants filed an emergency motion with this Court, asking it to stay the district-court proceedings pending appeal, and asking for a temporary administrative stay pending consideration of that motion.

On August 27, 2021—after the defendants had filed their emergency motion with this Court—the district court issued an order acknowledging that the notice of appeal had divested it of jurisdiction over the claims against the government defendants, and ordered the proceedings stayed with respect to those defendants only. ROA.1571-1572. But the district court insisted that it retained jurisdiction over the claims against Mr. Dickson, even though Mr. Dickson had joined the appeal, because it held that Mr. Dickson has "no claim to sovereign immunity," and that the "the denial of his motion to dismiss is not appealable." ROA. 1572. So the district court refused to vacate the preliminary-injunction hearing or stay proceedings with respect to the claims

against Mr. Dickson. *See id.* Later that day, this Court issued an administrative stay of all district-court proceedings, including the preliminary-injunction hearing that had been scheduled to proceed against Mr. Dickson, pending its disposition of the defendants' motion for emergency relief.

In the meantime, the plaintiffs responded to the notice of appeal by launching a flurry of motions in an effort to quickly return to this case to the district court. First, the plaintiffs asked the district court to reclaim jurisdiction over the case by certifying the defendants' appeal as "frivolous." ROA.1551-1560. The district court denied this request out of hand. ROA.1571-1572. Then the plaintiffs asked this Court to adopt a hyper-expedited briefing schedule that would require the defendants to file their opening appellants' brief by Saturday, August 28 at noon central time, with the plaintiffs' answering brief due on Sunday, August 29, at 5:00 P.M. central time, and a ruling from this Court that would resolve the appeal "on the papers" by September 1, 2021. The Court summarily denied this request. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, --- & n.7 (5th Cir. 2021). Then the plaintiffs asked this Court for an injunction that would prevent the defendants from enforcing Senate Bill 8 during the appeal. It also asked this Court to vacate the administrative stay that it had issued on August 27, 2021, as well as the stay of proceedings that the district court had entered with respect to the government defendants. And in a last-ditch effort, the plaintiffs asked this Court to vacate the district court's order denying the defendants'

Rule 12(b)(1) motions and dismiss the appeal as moot. The Court denied all these requests. *See id.* at --- & n.7.

The plaintiffs then sought emergency relief from the Supreme Court, asking the Court to enjoin the defendants from enforcing the Heartbeat Act and to vacate the stays of the district-court proceedings. The justices denied both requests on September 1, 2021, holding that the plaintiffs had failed to make a "strong showing" of likely success on the jurisdictional issues, while cautioning that they were not definitively resolving "any jurisdictional or substantive claim in the applicants' lawsuit." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021).

Finally, on September 10, 2021, the motions panel of this Court issued an opinion explaining why it had denied the plaintiffs' emergency request for an injunction pending appeal. *See Whole Woman's Health v. Jackson*, 13 F.4th 434 (5th Cir. 2021). The Court held that the plaintiffs had failed to establish a "strong likelihood of success on the merits," which is needed to obtain an injunction pending appeal. *See id.* at --- (citing *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 957 (5th Cir. 1981)). More specifically, the Court held that the plaintiffs had no conceivable claims against Attorney General Paxton or any of the state-agency defendants (Carlton, Thomas, Young, and Benz) because each of these officials is statutorily barred from enforcing the Heartbeat Act. *See id.* at --- ("[T]he Texas Attorney General has no official connection whatsoever with the statute."); *id.* at --- ("The agency officials sued here have no comparable 'enforcement' role

under S.B. 8."); *see also* Tex. Health & Safety Code § 171.207(a) (ROA.93). The Court also held that the claims against Judge Jackson and Ms. Clarkston were "specious" because *Ex parte Young*, 209 U.S. 123 (1908), "explicitly excludes judges from the scope of relief it authorizes," and because "it is well established that judges acting in their adjudicatory capacity are not proper Section 1983 defendants in a challenge to the constitutionality of state law." *Whole Woman's Health*, 13 F.4th at ---. The Court also held that Mr. Dickson could pursue his Article III standing objections as part of this interlocutory appeal, and it granted Mr. Dickson's motion to stay the district-court proceedings pending appeal. *See id.* at ---. Finally, the Court expedited this appeal to the next available oral-argument panel. *See id.* at ---.

SUMMARY OF ARGUMENT

There are numerous reasons why this case should be dismissed under Rule 12(b)(1), and many of them are addressed in the briefs from the other appellants. Mr. Dickson's brief will focus on four of these jurisdictional defects: (1) The absence of any Article III case or controversy with respect to claims against Mr. Dickson; (2) The absence of subject-matter jurisdiction with respect to the claims against Judge Jackson and Ms. Clarkston; (3) The district court's decision to allow the plaintiffs to seek relief that protects nonparties to this litigation; and (4) The district court's refusal to require the plaintiffs to establish standing with respect to each provision in Senate Bill 8.

The plaintiffs have no Article III standing to sue Mr. Dickson because he has disclaimed any intention of suing them under Senate Bill 8's private civil-

enforcement mechanism. Mr. Dickson has submitted sworn declarations to that effect,[4] and the plaintiffs do not allege and have no produced no evidence that Mr. Dickson is lying in these declarations. These unrebutted declarations preclude any possible "injury in fact" that is: (1) traceable to Mr. Dickson; and (2) redressable by an injunction that restrains Mr. Dickson from suing the plaintiffs. The plaintiffs also lack standing to sue Mr. Dickson over Senate Bill 8's fee-shifting provision because Mr. Dickson has not attained "prevailing party" status that would allow him to seek a fee award, and because Mr. Dickson has declared under oath that he currently has no intention of seeking fees under Senate Bill 8 if he prevails in this litigation.[5]

The plaintiffs' claims against Judge Jackson and Ms. Clarkston are likewise barred by Article III. The binding precedent of this Court prohibits litigants from suing state-court judges and court clerks when seeking to enjoin the enforcement of an allegedly unconstitutional statute. *See Bauer v. Texas*, 341 F.3d 352, 359 (5th Cir. 2003); *Chancery Clerk of Chickasaw County v. Wallace*, 646 F.2d 151, 160 (5th Cir. 1981). And for good reason: A judge who acts in an adjudicatory capacity is serving as an impartial arbiter of the law. He has no "adversity" to a plaintiff who is challenging the constitutionality of a statute, and the rules of judicial ethics prohibit a judge from defending a stat-

4. ROA.664 ("I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8."); ROA.664-665; ROA.965-968.

5. ROA.666 ("I currently have no intention of suing the plaintiffs under section 30.022").

ute's constitutionality as a partisan litigant when he will be called upon to resolve those same constitutional challenges in judicial capacity.[6] It is absurd to put a judge in a position where he is forced to defend the merits of a legislative enactment and litigate against the individuals who intend to challenge the constitutionality of that statute in his courtroom. And if that were not enough, the defendants' claims against Judge Jackson and Ms. Clarkston are also barred by the Eleventh Amendment, as the *Ex parte Young* exception to sovereign immunity specifically excludes lawsuits to enjoin state-court judges from adjudicating cases. *See Ex parte Young*, 209 U.S. 123, 163 (1908) ("[A]n injunction against a state court would be a violation of the whole scheme of our government."); *Whole Woman's Health v. Jackson*, 13 F.4th 434, --- (5th Cir. 2021).

Finally, the plaintiffs lack Article III standing to pursue relief that prevents the enforcement of Senate Bill 8 against non-parties to this litigation. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). The plaintiffs also lack standing to challenge any provision of the Heartbeat Act apart from sections 3 and 4, as they have failed to allege injury from the enforcement (or potential enforcement) of those other provisions. Yet the district court allowed the

6. *See* Canon 3(B)(10), Texas Code of Judicial Ethics ("A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."), available at https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf (last visited on October 13, 2021).

plaintiffs to pursue an injunction that would block enforcement of the *entire* Act, in defiance of *In re Gee*, 941 F.3d 153 (5th Cir. 2019), which declares that "plaintiffs must establish standing for each and every provision they challenge." *Id.* at 160. And the district court allowed the plaintiffs to pursue an injunction that would prohibit the enforcement of Senate Bill 8 against *anyone*, even though there is no allegation that the plaintiffs will be harmed by the enforcement of the statute against non-parties. Although it is not necessary for the Court to reach these issues if it concludes that the judiciary lacks subject-matter jurisdiction to consider any of the plaintiffs' claims, it should still rebuke the district court for its disregard of *Gee* and its willingness to allow the plaintiffs to pursue a patently overbroad remedy.[7]

STANDARD OF REVIEW

The district court's denial of the defendants' motions to dismiss for lack of subject-matter jurisdiction is subject to de novo review. *See Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

7. *See In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *vacated on other grounds by Planned Parenthood Center for Choice v. Abbott*, 141 S. Ct. 1261 (2021) ("[T]he district court purported to enjoin GA-09 as to *all* abortion providers in Texas. But Respondents are only a subset of Texas abortion providers and did not sue as class representatives. The district court lacked authority to enjoin enforcement of GA-09 as to anyone other than the named plaintiffs. The district court should be mindful of this limitation on federal jurisdiction at the preliminary injunction stage." (citation omitted)).

ARGUMENT

I. The District Court Erred By Refusing To Dismiss The Claims Against Mr. Dickson

The plaintiffs are asserting seven claims against Mr. Dickson. ROA.77-84. Five of these claims challenge the constitutionality of section 3 of the Heartbeat Act, which prohibits abortion after fetal heartbeat and authorizes private civil-enforcement lawsuits against those who violate the statute. ROA.77-82. The remaining two claims concern section 4 of the Heartbeat Act, which allows prevailing defendants in abortion-related litigation to recover their costs and attorneys' fees from unsuccessful plaintiffs. ROA.82-84. The plaintiffs lack Article III standing to pursue any of these claims against Mr. Dickson, and we will discuss each category of claims in turn.

A. The Plaintiffs Lack Standing To Sue Mr. Dickson Over Section 3 Because Mr. Dickson Has No Intention Of Suing Them

The plaintiffs have no standing to sue Mr. Dickson over section 3 because Mr. Dickson has no intention of suing them (or anyone else) under the Heartbeat Act's private civil-enforcement mechanism, and he has said so in unrebutted declarations. ROA.664 ("I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8."); *see also* Declaration of Mark Lee Dickson ¶¶ 4–7 (ROA.664-665); Supplemental Declaration of Mark Lee Dickson ¶¶ 5–15 (ROA.965-968).[8] So the

8. It is appropriate for this Court to consider affidavits or declarations when resolving a Rule 12(b)(1) motion. *See Carmichael v. United Technologies Corp.*, 835 F.2d 109, 114 n.7 (5th Cir. 1988). When a defendant in-

plaintiffs are not suffering an injury caused by Mr. Dickson. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("If the plaintiff does not claim to have suffered an injury *that the defendant caused* and the court can remedy, there is no case or controversy for the federal court to resolve." (emphasis added) (citation and internal quotation marks omitted)).

The plaintiffs' standing to sue Mr. Dickson is determined by the facts that existed when the complaint was filed on July 13, 2021,[9] and it is undisputed that Mr. Dickson had no intentions, thoughts, or plans of suing any of the plaintiffs at that time. The complaint alleges that the plaintiffs were facing a "credible threat" that Mr. Dickson might sue them when the Heartbeat Act takes effect. ROA.54 (¶ 50). But Mr. Dickson's sworn declarations conclusively refute that allegation. Mr. Dickson has declared under oath:

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troduces affidavits or other evidence to contest the district court's subject-matter jurisdiction, it is considered a "factual attack" (rather than a "facial attack"), and the plaintiff "'must prove the existence of subject-matter jurisdiction by a preponderance of the evidence' and is 'obliged to submit facts through some evidentiary method to sustain his burden of proof.'" *Superior MRI Services, Inc. v. Alliance Healthcare Services, Inc.*, 778 F.3d 502, 504 (5th Cir. 2015) (quoting *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1096 (5th Cir. 1989)).

9. *See Carney v. Adams*, 141 S. Ct. 493, 499 (2020) ("[S]tanding is assessed 'at the time the action commences'" (quoting *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191 (2000)); *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.").

> I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8

ROA.664 (¶ 5).

> I have never threatened to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8, either publicly or privately, and I have never told anyone that I intend to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8. Nor have I ever formed an intention to sue any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8.

ROA.665 (¶ 6).

> I have never threatened to sue anyone under the private civil-enforcement mechanism provided in section 3 of Senate Bill 8, and I have no intention of suing any of the plaintiffs under that provision when the law takes effect on September 1, 2021.

ROA.965 (¶ 6). Neither the plaintiffs nor the district court claims that Mr. Dickson is lying in these declarations, and the plaintiffs failed to produce any evidence or declaration that contradicts Mr. Dickson's statements. So Mr. Dickson's declarations are unrebutted, and they compel a jurisdictional dismissal of the claims against him.

The district court tried to get around these sworn declarations by seizing on Mr. Dickson's statement that he "is expecting each of the plaintiffs to comply with the statute rather than expose themselves to private civil-enforcement lawsuits." ROA.1530. And Mr. Dickson indeed stated in hisdeclarations that he expects each of the plaintiffs to comply with the Heartbeat Act rather than subject themselves to private civil-enforcement lawsuits:

> I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8, because I expect each of the plaintiffs to comply with the Texas Heartbeat Act when it takes effect on September 1, 2021. I expect that the mere threat of civil lawsuits under section 171.208 will be enough to induce compliance.

ROA.664 (¶ 5).

> I continue to believe that the plaintiffs will comply with Senate Bill 8 and obviate the need for private civil-enforcement lawsuits. Indeed, no rational abortion provider or abortion fund (in my view) would subject itself to the risk of civil liability under Senate Bill 8, especially when the Supreme Court could overrule *Roe v. Wade* next term in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392.

ROA.665 (¶ 7).

> I continue to expect the plaintiffs to comply with Senate Bill 8 when it takes effect, and if the plaintiffs comply it will be impossible for anyone to sue the plaintiffs for non-compliance. That is one of many reasons why I have no intention of suing the plaintiffs under Senate Bill 8—and why I have made no plans and no threats to do so.

ROA.966 (¶ 7). But none of that changes the fact that Mr. Dickson has no intention of suing the plaintiffs and has never threatened to do so. Mr. Dickson's expectation of compliance is merely one of the *reasons* that he has no interest in suing the plaintiffs. The *fact* that Mr. Dickson has no intention of suing the plaintiffs remains undisputed.

Mr. Dickson is not arguing—and he has never argued at any stage of these proceedings—that the plaintiffs "must 'specifically allege' their intent to violate S.B. 8 in order to establish standing." ROA.1530. The district court

attributed this contention to Mr. Dickson, ROA.1530, but the district court is attacking a straw man. The law is abundantly clear that a litigant is not required to expose himself to penalties before seeking relief to prevent the enforcement of a statute,[10] and the mere chilling effect imposed by the *threat* of enforcement is enough to establish Article III injury. But a litigant still must show that the threat of enforcement is "fairly traceable" to the *person* that he has sued. This requirement is almost always satisfied when a litigant sues a government official charged with enforcing the disputed law,[11] because it is the government official's duty to enforce the law if the plaintiff violates it. But matters are different when a litigant sues a private citizen who is authorized (but not required) to bring lawsuits against those who violate a statute. In these situations, enforcement (or threatened enforcement) by the defendant cannot be presumed—and the plaintiffs must produce evidence that the defendant will sue them if they violate the statute, or that the defendant is threatening to sue in a manner that deters the exercise of constitutional

10. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").
11. Unless, of course, the government official explicitly disavows an intent to prosecute or enforce. *See, e.g.*, *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998) ("The Supreme Court has instructed us that a threat of prosecution is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will *not* enforce the statute." (citing *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)).

rights. And when a defendant has submitted sworn declarations disclaiming any intention of suing the plaintiffs under the disputed statute, the plaintiffs must produce evidence sufficient to refute those declarations to survive a Rule 12(b)(1) motion. *See Williamson v. Tucker*, 645 F.2d 404, 416 (5th Cir. 1981) ("[A] Rule 12(b)(1) motion can be based on the court's resolution of disputed facts as well as on the plaintiff's allegations and undisputed facts in the record.").

The plaintiffs produced no evidence that Mr. Dickson will sue them if they violate the Heartbeat Act, and they produced no evidence that Mr. Dickson has threatened to bring such lawsuits under Senate Bill 8.[12] The district court quoted four statements from Mr. Dickson and claimed that these statements "demonstrated his intent to enforce S.B. 8 if Plaintiffs violate the law." ROA.1531. But these statements come nowhere close to showing that Mr. Dickson intends to sue the plaintiffs if they violate the statute—and they certainly do not refute his sworn declarations to the contrary.

12. The plaintiffs tried to argue that Mr. Dickson's efforts to enact local ordinances that subject abortion providers and their enablers to private civil-enforcement lawsuit was somehow evidence that Mr. Dickson intends to become a plaintiff in a Senate Bill 8 enforcement action. ROA.773. The plaintiffs also claimed that Mr. Dickson's threats to sue Planned Parenthood under a Lubbock ordinance that outlaws abortion could somehow show that Mr. Dickson intends to sue under Senate Bill 8 when he has explicitly renounced any intention to do so. ROA.773. These arguments are non sequiturs, and the district court did not attempt to rely on any of this.

Consider the first of these statements, taken from Mr. Dickson's declaration, in which he says: "I expect that the mere threat of civil lawsuits under section 171.208 will be enough to induce compliance" with SB 8. ROA.664. The district court claimed this statement "demonstrated" Mr. Dickson's "intent to enforce S.B. 8 if Plaintiffs violate the law,"[13] but it does nothing of the sort. This statement is merely a prediction that the plaintiffs will comply with the Heartbeat Act rather than violate the statute and subject themselves to lawsuits. It says nothing at all about what Mr. Dickson will do if a plaintiff unexpectedly decides to violate the law.

The district court also relied on three of Mr. Dickson's Facebook postings, which informed individuals about SB 8's private civil-enforcement regime and encouraged others to bring enforcement lawsuits against abortion providers. ROA.1531-1532. The text of these statements is as follows:

> [B]ecause of [S.B. 8] you will be able to bring many lawsuits later this year against any abortionists who are in violation of this bill. Let me know if you are looking for an attorney to represent you if you choose to do so. Will be glad to recommend some.[14]
>
> [B]ecause of this bill you will be able to bring many lawsuits later this year against any at WWH [Whole Woman's Health] who are in violation of this law[15]
>
> The Heartbeat Bill is being said to make everyone in Texas an attorney general going after abortionists.[16]

13. ROA.1531.
14. ROA.804.
15. ROA.801.

ROA.1531-1532. But statements that truthfully relate the contents of Senate Bill 8—and that offer to recommend attorneys to *others* who might be interested in bringing private civil-enforcement lawsuits—do not in any way show that Mr. Dickson himself intends to sue the plaintiffs. And in all events, Mr. Dickson's unrebutted declarations prevent this Court from drawing any such inferences from these social-media statements. ROA.664 ("I have no intention of suing any of the plaintiffs under the private civil-enforcement lawsuits described in Senate Bill 8."); *see also* Declaration of Mark Lee Dickson ¶¶ 4–7 (ROA.664-665); Supplemental Declaration of Mark Lee Dickson ¶¶ 5–15 (ROA.965-968).

Finally, Mr. Dickson's statements that describe SB 8 and that offer to connect individuals with attorneys are constitutionally protected speech, and the plaintiffs have not alleged that there was anything unlawful about Mr. Dickson's social-media postings. So even if the plaintiffs could plausibly allege that these statements have injured them by increasing the likelihood that others might sue them if they violate SB 8, that *still* cannot establish Article III standing because the plaintiffs must show an injury caused by Mr. Dickson's "allegedly unlawful" conduct. *See California v. Texas*, 141 S. Ct. 2104, 2113 (2021) ("A plaintiff has standing only if he can allege personal injury fairly traceable to the defendant's *allegedly unlawful conduct*" (emphasis added) (citation and internal quotation marks omitted)); *id.* at 2116 ("[P]laintiffs

16. ROA.706.

have similarly failed to show that they have alleged an 'injury fairly traceable to the defendant's allegedly *unlawful* conduct.'" (citation omitted)). The plaintiffs have never alleged that Mr. Dickson acted unlawfully by describing SB 8's civil-enforcement provision on Facebook or by offering to recommend attorneys to those who might be interested in suing abortion providers. ROA.39-87 (complaint). And they are not asking the Court to enjoin Mr. Dickson from uttering statements of this sort or posting them on social media. ROA.84-85 (request for relief). So none of Mr. Dickson's social-media statements can serve as a basis for Article III standing. The plaintiffs must show that Mr. Dickson himself intends to sue them if they violate the Heartbeat Act, and they cannot make this showing when Mr. Dickson has disclaimed any such intention in sworn declarations. ROA.664-665; ROA.965-968.

None of this is to deny that the plaintiffs are suffering "injury in fact" under Article III. But the plaintiffs' injuries are harms that arise from the *existence* of the Heartbeat Act, rather than any action taken by Mr. Dickson. The plaintiffs, for example, complain that section 3 presents them with a "Hobson's choice": They must either comply with the requirements of section 3 or else subject themselves and their employees to private civil-enforcement lawsuits. ROA.70 (¶ 102). But this "dilemma injury" cannot support Article III standing unless it is "fairly traceable" to Mr. Dickson. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he injury has to be fairly traceable to the challenged action of the defendant, and not the re-

sult of the independent action of some third party not before the court." (cleaned up) (citation and internal quotation marks omitted)). And the undesirable choice that has been foisted upon the plaintiffs is not "traceable" to Mr. Dickson; it was imposed by the legislature that enacted Senate Bill 8.

B. The Plaintiffs Lack Standing To Sue Mr. Dickson Over Section 3 Because The Requested Relief Will Not Redress Their Injuries

There is a separate and independent obstacle to the plaintiffs' standing to sue Mr. Dickson over section 3. Even if the plaintiffs had alleged that they will violate Senate Bill 8 and that Mr. Dickson will sue them in response, the Court cannot "redress" that injury by enjoining Mr. Dickson from suing the plaintiffs under section 3. Senate Bill 8 allows anyone[17] to sue a person that performs or aids or abets a post-heartbeat abortion, or that intends to engage in such conduct. *See* Tex. Health & Safety Code § 171.208(a). And if Mr. Dickson is enjoined from suing, there are countless others that will sue to recover the $10,000 for each illegal abortion that the plaintiffs perform or assist. *See* Declaration of Mark Lee Dickson ¶ 8 (ROA.665-666); Declaration of John Seago ¶¶ 5–6 (ROA.668). An injunction that stops only Mr. Dickson from suing—while leaving the door open for everyone else in the world to sue the plaintiffs for their violations of Senate Bill 8—does not redress any injury that the plaintiffs are suffering on account of the statute.

17. Other than Texas government officials and individuals who impregnated the mother of the fetus through rape or some other illegal act. *See* Tex. Health & Safety Code §§ 171.208(a); 171.208(j).

Senate Bill 8 allows only a single recovery of $10,000 for each post-heartbeat abortion that a defendant performs or assists,[18] so an injunction that prevents Mr. Dickson (and only Mr. Dickson) from suing does nothing to reduce the monetary exposure that the plaintiffs face under the statute. It also does nothing to reduce the deterrent effect of Senate Bill 8's private civil-enforcement regime. Someone will still sue the plaintiffs to collect the $10,000 per illegal abortion that the statute authorizes; taking Mr. Dickson out of the mix does nothing to eliminate (or even alleviate) the injuries described in the plaintiffs' complaint.

The district court tried to get around this problem by claiming that an injunction against Mr. Dickson will reduce the plaintiffs' litigation costs at the margin by eliminating any possibility of lawsuits from Mr. Dickson—even as the plaintiffs deal with enforcement lawsuits filed by other individuals. ROA.1532 ("Plaintiffs have alleged that an injunction preventing Dickson from bringing enforcement actions under S.B. 8 would redress their injuries, at least in part, by preventing Dickson from 'suing and imposing significant

18. *See* Tex. Health & Safety Code § 171.208(c) ("Notwithstanding Subsection (b), a court may not award relief under this section in response to a violation of Subsection (a)(1) or (2) if the defendant demonstrates that the defendant previously paid the full amount of statutory damages under Subsection (b)(2) in a previous action for that particular abortion performed or induced in violation of this subchapter, or for the particular conduct that aided or abetted an abortion performed or induced in violation of this subchapter.").

litigation costs on Plaintiffs.'"). But there are two problems with this argument.

First, Mr. Dickson has specifically disclaimed any interest in "piling on" with a "me-too lawsuit" if others are willing to sue the plaintiffs—and it is undisputed that there *are* numerous other individuals who will sue the plaintiffs if they defy Senate Bill 8. *See* Supplemental Declaration of Mark Lee Dickson at ¶ 15 (ROA.968) ("I know that there will be countless other individuals who will sue the plaintiffs if they violate the statute, and I have no interest in piling on with a me-too lawsuit. The statute allows only one plaintiff to recover the $10,000 per illegal abortion performed. My time is better spent on other matters than pursuing redundant litigation against the plaintiff abortion providers and the plaintiff abortion funds.").[19] So the plaintiffs will not reduce their litigation costs by *any* amount if Mr. Dickson is enjoined.

Second, the plaintiffs' complaint does not plead facts concerning this theory of redressability, and that alone requires dismissal of their claim against Mr. Dickson. The Supreme Court has held more times than we can count that complaints must allege facts necessary to establish each element

19. *See also* Declaration of Mark Lee Dickson ¶ 8 (ROA.665-666) ("I have personal knowledge that there are many other individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy Senate Bill 8"); Declaration of John Seago ¶ 6 (ROA.668) ("I have personal knowledge that there are several individuals who intend to sue the abortion-provider plaintiffs and the abortion-fund plaintiffs if they defy Senate Bill 8.").

of Article III standing—and that complaints that fail to allege these facts *must* be dismissed. *See, e.g.*, *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016) ("Where, as here, a case is at the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element [of Article III standing]."); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) ("[P]laintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm."); *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990) ("The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing."); *Warth v. Seldin*, 42 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers."). Litigants in abortion cases are not an exception to this rule. The factual allegations surrounding the district court's theory of redressability are nowhere to be found in the complaint, so the Court should reject the district court's redressability argument for that reason alone.

The district court also claimed that a declaratory judgment against Mr. Dickson would "redress" the plaintiffs' alleged injuries by "discouraging others" from suing the plaintiffs. ROA.1532. But a judgment against Mr. Dickson has no binding effect on other courts or litigants. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court

judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."). So there is nothing that relief against Mr. Dickson can do to prevent other litigants from suing the plaintiffs.

The district court appeared to recognize this, as it was careful to assert only that a judgment against Mr. Dickson would "discourag[e]" and "deter[]" others from filing civil-enforcement lawsuits—rather than prevent them from doing so. ROA.1532. But that argument proves too much; if the mere persuasive force of a non-binding judicial opinion were enough to "redress" a plaintiff's injuries, then advisory opinions would meet the criteria for Article III standing. And the Supreme Court has never allowed a litigant to establish redressability by arguing that judicial relief might change the behavior of individuals who are not legally bound by the court's judgment. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992). This Court should not allow it either.

C. The Plaintiffs Lack Standing To Sue Mr. Dickson Over Section 4 Because Mr. Dickson Has No Intention Of Suing The Plaintiffs Under That Provision

The plaintiffs have no standing to sue Mr. Dickson over the Heartbeat Act's fee-shifting provisions because their complaint fails to allege any "inju-

ry in fact" traceable to Mr. Dickson—and no such injury is apparent. Mr. Dickson has no ability to sue the plaintiffs under section 4 because he has not been adjudged a "prevailing party" in any lawsuit that the plaintiffs have brought to prevent the enforcement of an abortion statute. *See* Declaration of Mark Lee Dickson ¶ 11 (ROA.666) ("I am not a party to any other lawsuit that seeks to prevent the enforcement of any Texas abortion law, and I have not been a party to any such lawsuit in the past."). And the plaintiffs do not allege that Mr. Dickson will acquire "prevailing party" status in this litigation, as any such prediction would amount to a confession that their claims against Mr. Dickson should lose. Indeed, the complaint makes no allegations of *any* Article III injury traceable to Mr. Dickson, and is entirely bereft of factual allegations involving Mr. Dickson's role in "enforcing" this provision against the plaintiffs. That alone requires dismissal of the section 4 claims, because a complaint must "clearly . . . allege facts demonstrating" each element of Article III standing to survive a motion to dismiss. *Spokeo,* 136 S. Ct. at 1547 (citation and internal quotation marks omitted)); *see also Clapper*, 568 U.S. at 414 n.5; *Whitmore*, 495 U.S. at 155-56; *Warth*, 42 U.S. at 518.

Mr. Dickson has declared under oath that he has no intention of suing the plaintiffs under section 4 even if he prevails in this litigation, because he plans to seek recovery of his attorneys' fees under 42 U.S.C. § 1988(b) rather than under section 4's fee-shifting provision. *See* Declaration of Mark Lee Dickson ¶ 9 (ROA.666) ("I currently have no intention of suing the plaintiffs under section 30.022 because I expect to recover fees from the plaintiffs un-

der 42 U.S.C. § 1988(b) at the conclusion of this litigation."). The law of this Court is clear that a private litigant does not act "under color of state law" by filing a lawsuit authorized by a state statute,[20] and Mr. Dickson is confident that this binding precedent is enough to show that the claims against him are "unreasonable" and "without foundation." *See id.* (quoting *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 418 (1978)). Mr. Dickson has not yet decided, however, whether he will sue the plaintiffs under section 4 if he is unsuccessful in recovering fees under 42 U.S.C. § 1988(b). *See* Declaration of Mark Lee Dickson ¶ 10 (ROA.666) ("If I am unsuccessful in recovering fees under 42 U.S.C. § 1988(b) at the conclusion of this litigation, then I will consider at that time whether to sue the plaintiffs under section 30.022 of the Texas Civil Practice and Remedies Code, in consultation with my attorneys.").

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20. *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992) ("If a state merely allows private litigants to use its courts, there is no state action within the meaning of § 1983 unless 'there is corruption of judicial power by the private litigant.'" (quoting *Earnest v. Lowentritt,* 690 F.2d 1198, 1200 (5th Cir. 1982)); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 555 (5th Cir. 1988) ("The growers cannot be held liable in a § 1983 suit simply because they filed suit under Texas statutes and obtained a temporary restraining order."); *Hollis v. Itawamba County Loans*, 657 F.2d 746, 749 (5th Cir. 1981) ("[N]o state action is involved when the state merely opens its tribunals to private litigants."); *Gras v. Stevens*, 415 F. Supp. 1148, 1152 (S.D.N.Y. 1976) (Friendly, J.) ("[W]e know of no authority that one private person, by asking a state court to make an award against another which is claimed to be unconstitutional, is violating 42 U.S.C. § 1983.").

The plaintiffs have no standing to sue Mr. Dickson under these circumstances. Any possibility that Mr. Dickson might someday sue them under section 4 is "conjectural" and "hypothetical"—and speculative injuries of that sort are insufficient to confer Article III standing. *See Lujan*, 504 U.S. at 560 (holding that an injury in fact must be "actual or imminent, not conjectural or hypothetical" (citation and internal quotation marks omitted)); *Whitmore*, 495 U.S. at 158 ("Allegations of possible future injury do not satisfy the requirements of Article III" because "[a] threatened injury must be 'certainly impending' to constitute injury in fact."); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct. The injury or threat of injury must be both real and immediate, not conjectural or hypothetical." (citations and internal quotation marks omitted)); *In re Gee*, 941 F.3d 153, 164 (5th Cir. 2019) ("Article III requires more than theoretical possibilities."). And the complaint has not even *alleged* the facts needed to establish Article III standing to sue Mr. Dickson over section 4, which is fatal to their claims. *See Spokeo,* 136 S. Ct. at 1547; *Clapper*, 568 U.S. at 414 n.5; *Whitmore*, 495 U.S. at 155-56; *Warth*, 42 U.S. at 518. Indeed, the complaint says nothing at all about how the plaintiffs might have standing to sue Mr. Dickson over the fee-shifting provision.

The district court entirely ignored the plaintiffs' failure to allege facts relevant to standing in their complaint. And the district court rejected Mr.

Dickson's standing objections by: (1) Prematurely ruling that Mr. Dickson will be unable to recover fees under 42 U.S.C. § 1988;[21] and (2) Declaring that "Dickson has demonstrated his intent to recover attorney's fees in this action, and in the absence of relief available to him under Section 1988, he will necessarily need to rely on Section 4 in making such a request." ROA.1533-1534. That is a mischaracterization of Mr. Dickson's declaration. Mr. Dickson did *not* say that he would unconditionally pursue attorneys' fees from the plaintiffs. Mr. Dickson said *only* that he would pursue fee-shifting under 42 U.S.C. § 1988, and that he had *made no decision* on whether he would seek fees under section 4 if his efforts to recover fees under section 1988 are unsuccessful:

> The plaintiffs also seek to enjoin me from filing a lawsuit to recover attorneys' fees under section 30.022 of the Texas Civil Practice and Remedies Code. I currently have no intention of suing the plaintiffs under section 30.022 because I expect to recover fees from the plaintiffs under 42 U.S.C. § 1988(b) at the conclusion of this litigation. . . .
>
> If I am unsuccessful in recovering fees under 42 U.S.C. § 1988(b) at the conclusion of this litigation, *then I will consider at that time whether to sue the plaintiffs under section 30.022 of the Texas Civil Practice and Remedies Code, in consultation with my attorneys.*

Declaration of Mark Lee Dickson ¶ 9–10 (ROA.666) (emphasis added). For the district court to claim that Mr. Dickson expressed an unconditional inten-

21. ROA.1533 ("[T]he Court finds that Dickson will not be able to rely on Section 1988 to recover fees in this action.").

tion to pursue a fee recovery is nothing short of misrepresentation. It was also improper for the district court to declare Mr. Dickson ineligible for fee-shifting under 42 U.S.C. § 1988(b) when Mr. Dickson has never filed a motion or had an opportunity to present his arguments for a fee recovery, and it was premature to do so before the conclusion of this litigation. Only at the conclusion of a lawsuit can a court accurately assess whether the action was "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

The plaintiffs cannot sue a private litigant for a declaratory judgment or anti-suit injunction when he made no threat to sue them under the disputed statutory provision and when he denies any present-day intention to do so—and that is especially true when Mr. Dickson is not even *capable* of suing the plaintiffs because he has never attained "prevailing party" status in any abortion-related lawsuit. *See Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273 (1941) ("[T]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."); *International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954) (a declaratory-judgment action may not be used "to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable."); *id.* ("Determination of the scope and constitutionality of legislation in advance of its immedi-

ate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."). The plaintiffs have no standing to sue Mr. Dickson over Senate Bill 8's fee-shifting provisions, and these claims against Mr. Dickson must be dismissed.

II. The District Court Erred By Refusing To Dismiss The Claims Against Judge Jackson And Ms. Clarkston

The district court likewise erred in refusing to dismiss the claims against Judge Jackson and Ms. Clarkston. Although these claims are nominally brought against Judge Jackson and Ms. Clarkston, Mr. Dickson is a real party in interest because these claims are attempting to strip Mr. Dickson (and others) of their state-law right to sue individuals that violate the Heartbeat Act. It is therefore appropriate for Mr. Dickson to argue for dismissal of those claims—especially when the grounds for dismissal concern jurisdictional obstacles, which counsel for all parties are duty-bound to bring to the Court's attention. *See Board of License Commissioners of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 n.23 (1997).

A. The Plaintiffs Lack Article III Standing To Sue Judge Jackson And Ms. Clarkston

A litigant cannot sue a state-court judge to prevent him from considering cases that might be filed under an allegedly unconstitutional statute. There is no Article III case or controversy between a person who fears that a future litigant might sue him and a judge who might someday preside over that hy-

pothetical future lawsuit. And a judge does not inflict Article III "injury" on a future litigant by sitting in his office and waiting to see if someone will file a lawsuit against that individual.

There is also no adversity when an individual challenges the constitutionality of a statute by suing a judge who might adjudicate future lawsuits under that statute.[22] A judge serves as an impartial arbiter of the law—and he is ethically precluded from defending the constitutionality of a statute as a private litigant when he will be called upon to resolve those same constitutional challenges in the cases that litigants bring before him.[23] As this Court explained in *Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003):

> The requirement of a justiciable controversy is not satisfied where a judge acts in his adjudicatory capacity. Similarly, a section 1983 due process claim is not actionable against a state judge acting purely in his adjudicative capacity because he is not a proper party in a section 1983 action challenging the constitutionality of a state statute.

22. *See Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) ("The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.").

23. *See* Canon 3(B)(10), Texas Code of Judicial Ethics ("A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."), available at https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf (last visited on October 13, 2021).

Id. at 359. This Court has similarly recognized that there is no Article III case or controversy when lawsuits are filed against court clerks engaged in judicial responsibilities:

> Because of the judicial nature of their responsibility, the chancery clerks and judges do not have a sufficiently "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues on which the court so largely depends for illumination of difficult constitutional questions."

Chancery Clerk of Chickasaw County v. Wallace, 646 F.2d 151, 160 (5th Cir. 1981) (citation omitted). The holdings of *Bauer* and *Wallace* are binding on the district court and on this panel, and they compel a dismissal of the claims brought against Judge Jackson and Ms. Clarkston. *See Whole Woman's Health v. Jackson*, 13 F.4th 434, --- (5th Cir. 2021) ("[I]t is well established that judges acting in their adjudicatory capacity are not proper Section 1983 defendants in a challenge to the constitutionality of state law.").

The district court claimed that the holdings of *Bauer* and *Wallace* apply only when there are other government officials who can be sued in a pre-enforcement lawsuit. ROA.1513 ("While in *Wallace* and *Bauer* the Fifth Circuit found that state judges were not the proper defendants because other state officials were more appropriately named as defendants due to their enforcement activities, here S.B. 8 forecloses Plaintiffs' ability to name anyone in the State's legislature or executive branch in this challenge."). Yet the district court seems to have forgotten that its opinion had already held that the plaintiffs *could* sue the state agency defendants for pre-enforcement relief

under Article III and *Ex parte Young*, despite the language of section 171.207(a) that explicitly prohibits them from enforcing the statute. ROA.1498-1510; *see also* ROA.1502 ("The Court finds that the Provider Plaintiffs have sufficiently alleged a demonstrated willingness on the part of the SAD to enforce abortion restrictions through administrative actions and that such actions are likely imminent here."). It is hard to comprehend how the district court could produce an opinion that so obviously contradicts itself in this manner.

And the district court was flatly wrong to claim that the holdings of *Bauer* and *Wallace* apply only when there is some other state official who can be sued. The holdings of those cases are categorical, and for good reason. There will *never* be an Article III case or controversy between a person who fears that he might be sued and a judge who might preside over that yet-to-be-filed lawsuit, or a clerk who might file the paperwork in that hypothetical future court proceeding. That is because any "injury" will result from the independent actions of third parties not before the Court, and a litigant cannot establish Article III standing when the alleged injury rests entirely on the conduct of independent third-party actors. *See Lujan*, 504 U.S. at 560 ("[T]he injury has to be fairly . . . traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." (cleaned up) (citation and internal quotation marks omitted)); *Clapper v. Amnesty International USA*, 568 U.S. 398, 414 (2013) ("We decline to abandon our usual reluctance to endorse standing theories

that rest on speculation about the decisions of independent actors."). The *only* people who might sue the plaintiffs in Smith County are "third parties not before the court."[24] So the plaintiffs' theory of standing rests on speculation that some independent actor—who is not before the court—will not only choose to sue the defendants, but will choose to sue the defendants *in Smith County*. That injury is not "fairly traceable" to Judge Jackson or Ms. Clarkston, because it cannot exist unless an independent third-party actor chooses to sue the plaintiffs in Smith County.

B. The Claims Against Judge Jackson And Ms. Clarkston Are Barred By Sovereign Immunity

The plaintiffs' claims against Judge Jackson and Ms. Clarkson must be dismissed for a separate and independent reason: The Eleventh Amendment forbids courts to assert jurisdiction over claims brought against non-consenting state officers sued in their official capacity, unless the claim fits within the *Ex parte Young* exception to sovereign immunity. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269-70 (1997); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.").[25] But the *Ex parte Young* ex-

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24. Mr. Dickson is legally incapable of suing the plaintiffs in Smith County because he resides in Gregg County *See* Declaration of Mark Lee Dickson, ECF No. 50-1, at ¶ 13 (ROA.667) ("I am a resident of Gregg County, not Smith County, and I have no intention of changing my residence to Smith County at any time in the future.").
25. A state district judge in Texas is a state officer and shares in the sovereign immunity of the state. *See Clark v. Tarrant County*, 798 F.2d 736,

ception does not authorize lawsuits to prevent a state's *judicial* officers from adjudicating and deciding cases brought before them:

> [T]he right to enjoin an individual, even though a state official, from commencing suits . . . does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature. . . . [A]n injunction against a state court would be a violation of the whole scheme of our government. . . . The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former.

Ex parte Young, 209 U.S. 123, 163 (1908).[26]

And even apart from *Ex parte Young*'s categorical prohibition on lawsuits to enjoin state courts from adjudicating cases, the plaintiffs face yet another insurmountable Eleventh Amendment obstacle. The *Ex parte Young* exception authorizes lawsuits only against a state officer who is violating or intends to violate federal law; that is what "strips" the officer of his sovereign authority and allows him to be sued as a rogue individual rather than as a component of a sovereign entity. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908);

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744 (5th Cir. 1986) (holding that district judges in Texas "are undeniably elected state officials" for purposes of the Eleventh Amendment).

26. The defendants are *not* contending that state-court judges can never be sued under 42 U.S.C. § 1983 or *Ex parte Young*. State judicial officers have been subjected to suit when they *enforce* statutes or perform ministerial duties such the issuance of marriage licenses, and the district court's opinion cites examples of such lawsuits. ROA.1518-1519. None of these cases allow judicial officers to be enjoined from considering or presiding over lawsuits in an adjudicatory capacity.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 (1984) ("[A]n official *who acts unconstitutionally* is 'stripped of his official or representative character'" (emphasis added) (quoting *Young*, 209 U.S. at 60 (1908)). That means the *Ex parte Young* exception can be used only to sue a federal lawbreaker or would-be lawbreaker; a state officer who is not violating federal law (and has no plans to do so) retains his sovereign immunity and cannot be subjected to suit.

It is preposterous to claim that Judge Jackson is violating the Constitution—and has forfeited his sovereign immunity—by sitting in his chambers waiting to see if someone files a lawsuit under Senate Bill 8 that winds up getting assigned to him. The plaintiffs have not even alleged (let alone produced evidence) that any resident of Smith County plans to sue any of the plaintiffs when Senate Bill 8 takes effect on September 1, so it is nothing but rank speculation to assert that Judge Jackson is about to violate federal law. And even if the plaintiffs could prove that someone is about to file a Senate Bill 8 enforcement action in Judge Jackson's Court, a state judge does not violate the Constitution merely by presiding over a lawsuit between private litigants—even if the lawsuit is brought under an allegedly unconstitutional statute. A judge that adjudicates a case does not become a federal lawbreaker unless and until he enters an actual ruling that violates someone's federally protected rights. Then (and only then) can a state judge be stripped of his sovereign character and regarded as a rogue individual actor.

It is even more untenable to claim that Ms. Clarkston would be breaking federal law by accepting petitions or documents for filing. A court clerk is not responsible for judging the merits of a lawsuit, and must file documents submitted by litigants even when the filing is frivolous, malicious, or based on an unconstitutional statute. It is the responsibility of the litigant—not the court clerk—to ensure that his court filings respect the constitutional rights of an opposing party. And it is the responsibility of the judge (not the clerk) to evaluate the merits of a legal filing and dispose of it in accordance with law. The clerk does nothing wrong—and certainly nothing illegal—by accepting a court filing that seeks to enforce an unconstitutional statute, no matter how unconstitutional the underlying statute may be.

There is no authority supporting the idea that a state judge forfeits his sovereign immunity whenever a private litigant *might* file a lawsuit in his courtroom that seeks to enforce an allegedly an unconstitutional statute. On the contrary, existing law makes abundantly clear that state-court judges are *not* permissible defendants in this situation. *See Bauer*, 341 F.3d at 357; *Wallace*, 646 F.2d at 160; *Allen v. DeBello*, 861 F.3d 433, 440 (3d Cir. 2017) ("[A] judge who acts as a neutral and impartial arbiter of a statute is not a proper defendant to a Section 1983 suit challenging the constitutionality of the statute."). There is also nothing in existing law to support the idea that a state-court clerk is "stripped" of her sovereign immunity or violates 42 U.S.C. § 1983 by accepting filings from private litigants who seek to enforce an unconstitutional statute. *See Wallace*, 646 F.2d at 160; *Mendez v. Heller*, 530

F.2d 457 (2d Cir. 1976) (state court judges and clerks could not be sued as defendants in a lawsuit challenging New York's durational residence requirement for divorce). And the district court's opinion does not even attempt to explain how Judge Jackson or Ms. Clarkston can be considered federal lawbreakers who have forfeited their sovereign immunity.

III. The District Court Erred By Allowing The Plaintiffs To Seek Relief That Protects Nonparties To This Litigation

The plaintiffs seek to prevent Mr. Dickson from suing *anyone* under section 3 or section 4 of Senate Bill 8—even if the person or entity that Mr. Dickson sues is not a party to this case. The plaintiffs also seek to prevent the remaining defendants from enforcing Senate Bill 8 against anyone, including non-parties to this proceeding. But the plaintiffs have no standing to seek relief that prevents the defendants from enforcing Senate Bill 8 against non-parties, absent allegations and evidence that the enforcement of Senate Bill 8 against those non-parties will inflict "injury in fact" on the named plaintiffs. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute."); *United States v. National Treasury Employees Union,* 513 U.S. 454, 477-78 (1995) (limiting relief to the parties before the Court and noting "we neither want nor need to provide relief to nonparties when a narrower remedy will fully

protect the litigants"); *In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020), *vacated on other grounds by Planned Parenthood Center for Choice v. Abbott*, 141 S. Ct. 1261 (2021) ("[T]he district court purported to enjoin GA-09 as to *all* abortion providers in Texas. But Respondents are only a subset of Texas abortion providers and did not sue as class representatives. The district court lacked authority to enjoin enforcement of GA-09 as to anyone other than the named plaintiffs. The district court should be mindful of this limitation on federal jurisdiction at the preliminary injunction stage." (citation omitted)).[27]

The plaintiffs have not asked the district court to certify them as class representatives; they have sued only as individual litigants. Yet the plaintiffs somehow think that the courts can treat this case as a de facto class action and allow them to seek relief that protects *every* individual or entity that might conceivably be sued under Senate Bill 8. But the judicial power extends only to resolving cases or controversies between parties, and the Court's relief may extend only to the named litigants, or to classes that have been certified consistent with the requirements of Rule 23. *See Doran*, 422 U.S. at 931; *Abbott*, 954 F.3d at 786 n.19; note 27 and accompanying text.

27. *See also McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("[T]he question at issue [is] whether a court may grant relief to non-parties. The right answer is no."); *Zepeda v. I.N.S.*, 753 F.2d 719, 727-28 (9th Cir. 1983) ("[An] injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs.").

The only time that a court may issue relief that extends beyond the named litigants or a certified class is when such a remedy is needed to ensure that the prevailing parties obtain the relief to which they are entitled. *See Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 273-74 (5th Cir. 1984). But that allowance is not applicable here. The only relief to which the plaintiffs might be entitled is a declaration or an injunction that shields *them* from private civil-enforcement lawsuits brought under section 3, and that shields *them* from attorney-fee-collection lawsuits brought under section 4. The plaintiffs have not alleged that they will suffer Article III injury from lawsuits or other enforcement actions brought against nonparties to this litigation, and they have no standing to assert the rights or interests of non-parties in the absence of a certified class. *See Davis v. Romney,* 490 F.2d 1360, 1366 (3d Cir. 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper."). So the district court was, at the very least, required to dismiss the plaintiffs' claims to the extent that they seek to block the enforcement of Senate Bill 8 against non-parties to this lawsuit.

The district court refused to do this because it claimed that the plaintiffs "have clearly sought relief on behalf of themselves and do not purport to bring their claims on behalf of others not before this Court." ROA.1534. That is *exactly* the problem. The plaintiffs are suing only on behalf of themselves as individuals and not as class representatives, yet they are demanding relief that would protect *everyone* from SB 8 enforcement lawsuits. ROA.84 (re-

quested relief). The plaintiffs do not have standing to seek relief that protects nonparties to this lawsuit, absent allegations that the enforcement of Senate Bill 8 against non-parties will inflict Article III injury *on the plaintiffs*. The complaint is bereft of any such allegations, and the district court was obligated to hold that the plaintiffs lack standing to seek relief that blocks the enforcement of Senate Bill 8 against non-parties.

There is no need for the Court to reach this issue if it agrees with the defendants' other jurisdictional objections. But it is nonetheless important to remind litigants (and district judges) that courts exist to resolve cases or controversies between named litigants, not to sit as a Council of Revision. *See Okpalobi v. Foster*, 244 F.3d 405, 426-29 (5th Cir. 2001) (en banc); *Collins v. Mnuchin*, 938 F.3d 553, 610-11 (5th Cir. 2019) (Oldham, J., concurring in part and dissenting in part). An individual plaintiff lacks Article III standing to seek relief that prevents the enforcement of a statute against non-parties, unless the enforcement of that statute against non-parties will injure *him* in some concrete and particularized way. The belief that a court can enjoin SB 8's enforcement against anyone is a manifestation of the belief that courts "strike down" or formally revoke statutes when declaring them unconstitutional—a fallacy that this Court has repeatedly exposed. *See Pool v. City of Houston*, 978 F.3d 307, 309 (5th Cir. 2020) ("It is often said that courts 'strike down' laws when ruling them unconstitutional. That's not quite right."); *Texas v. United States*, 945 F.3d 355, 396 (5th Cir. 2019) ("The federal courts have no authority to erase a duly enacted law from the statute

books, [but can only] decline to enforce a statute in a particular case or controversy." (citation and internal quotation marks omitted)); *Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) ("An injunction enjoins a defendant, not a statute."). The Court should hold (once again) that plaintiffs who sue as individuals rather than class representatives lack Article III standing to pursue classwide relief. *See Abbott*, 954 F.3d at 786 n.19 (5th Cir. 2020).

IV. The District Court Erred By Refusing To Require The Plaintiffs To Establish Article III Standing With Respect To Each Provision Of Senate Bill 8

There are additional jurisdictional obstacles to the plaintiffs' lawsuit. The plaintiffs are demanding relief that would prevent the defendants from enforcing *any* provision or application of Senate Bill 8. ROA.84 (demanding relief that would prevent the defendants "from enforcing S.B. 8 in any way"). But the provisions of Senate Bill 8 are severable, and the plaintiffs failed to allege any injury from the provisions in Senate Bill 8 apart from sections 3 and 4. Section 10 of the Act says:

> Every provision in this Act and every application of the provision in this Act are severable from each other. If any provision or application of any provision in this Act to any person, group of persons, or circumstance is held by a court to be invalid, the invalidity does not affect the other provisions or applications of this Act.

ROA.112. Section 5 also amends the Code Construction Act to establish a new rule of construction for every Texas statute that regulates abortion, requiring courts not only to sever the statute's provisions and applications but

also to construe the statute, as a matter of state law, as applying *only* in situations that will not result in a violation of constitutional rights. ROA.104-105 (to be codified at Tex. Gov't Code § 311.036(c)). And if that were not enough, section 3 of the Act adds an emphatic (and largely redundant) severability clause and saving-construction requirement that applies to each provision of Chapter 171 of the Texas Health and Safety Code. ROA.100-102 (to be codified at Tex. Health & Safety Code § 171.212); *see also* Tex. Gov't Code § 311.032(a) ("If any statute contains a provision for severability, that provision prevails in interpreting that statute.").

Because the statute is severable, the plaintiffs must establish Article III standing to sue over *each* provision of Senate Bill 8 that they seek to enjoin. *See In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) ("It is now beyond cavil that plaintiffs must establish standing for each and every provision they challenge." (citing authorities)); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."); *Davis v. Federal Election Commission*, 554 U.S. 724, 733-34 (2008) (standing to challenge one statutory subsection does not confer standing to challenge a neighboring statutory subsection). The plaintiffs have no standing to seek an injunction that prevents Mr. Dickson from "enforcing" provisions in Senate Bill 8 that cannot be enforced through private citizen-enforcement suits. *See Okpalobi v. Foster*, 244 F.3d 405, 426-27 (5th Cir. 2001) (en banc). That includes sections 1 through 2 and

sections 5 through 12, which do not authorize (or purport to authorize) any type of civil-enforcement lawsuits brought by private citizens.[28]

The district court brushed aside this objection by claiming that "severability is a question of remedy, [to be] considered only after a legal violation has been established on the merits." ROA.1529 (citation and internal quotation marks omitted); *see also* ROA.1530 ("The Court rejects Dickson's argument that Plaintiffs must establish standing as to provisions of S.B. 8 that they do not challenge as against Dickson to sustain their claims against him."). The district court's stance defies the law of this Court, which requires litigants to establish Article III standing for "each and every provision that they challenge." *Gee*, 941 F.3d at 160. A court cannot determine whether the plaintiffs have Article III standing for "each and every provision that they challenge" unless it applies the statute's severability requirements and demands that the plaintiffs show how they have standing to challenge "each" of Senate Bill 8's severable provisions. This is not a question of remedy, but a question of *standing*—and it must be assessed and resolved at the outset of the litigation. *See Gee*, 941 F.3d at 160.

The plaintiffs did not deny that the provisions of Senate Bill 8 are severable, and neither did the district court. The district court flouted *Gee* by allowing the plaintiffs to seek an injunction against the enforcement of the entire

28. The plaintiffs likewise have no standing to sue Judge Jackson or Ms. Clarkston over those provisions.

statute, even though the plaintiffs had attempted to establish standing only with respect to sections 3 and 4.

* * *

The plaintiffs bear the burden of proving subject-matter jurisdiction, and they came nowhere close to carrying that burden in the district court. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) ("[B]ecause '[w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record,' the party asserting federal jurisdiction when it is challenged has the burden of establishing it"). This Court is constitutionally obligated to ensure that the federal judiciary respects the limits on judicial power imposed by Article III and the Eleventh Amendment, especially when a litigant seeks to downplay jurisdictional obstacles in its zeal to secure a judicial pronouncement on the constitutionality of a statute. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."). The jurisdictional barriers to the plaintiffs' claims are insurmountable, and the district court's refusal to respect the constitutional limits on judicial authority merits a swift and emphatic reversal.

CONCLUSION

The district court's order denying the defendants' motions to dismiss should be vacated, and the case should be remanded with instructions to dismiss for lack of subject-matter jurisdiction.

Respectfully submitted.

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Counsel also certifies that on October 13, 2021, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, through the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov.

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